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IN THE
COURT OF APPEALS OF INDIANA

DANNY L. KREAIS, Appellant-Defendant,	)	
vs.	)	No. 76A03-0605-CV-210
ALVA J. BUTLER and SANDRA K. BUTLER, Appellees-Plaintiffs.	)	
D & D INVESTMENTS and DENISE PAYTON, Defendants.[1]	)	

APPEAL FROM THE STEUBEN SUPERIOR COURT
The Honorable William C. Fee, Judge
Cause No. 76D01-0308-PL-421

March 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

[1] Defendants D & D Investments and Denise Payton are not seeking relief on appeal and have not filed a brief as appellants or appellees. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

Case Summary

Appellant-Defendant Danny Kreais ("Kreais") appeals the trial court's judgment in favor of the Appellees-Plaintiffs Alva J. and Sandra K. Butler ("the Butlers") on their claims of breach of contract and conversion. We affirm.

Issues

Kreais raises several issues, which we consolidate and restate as:

I. Whether Kreais was personally responsible for the unpaid rent under a lease for commercial property owned by the Butlers;

II. Whether the trial court properly calculated damages as to the converted property; and

III. Whether the Butlers are entitled to attorney's fees and costs.

Facts and Procedural History

The facts most favorable to the decision below indicate that the Butlers were the owners of commercial property located at 3875 North Bayview Road ("the Property") in Angola until December of 2003. In June of 2001, Kreais and his girlfriend, Denise Payton ("Payton"), approached the Butlers about leasing the Property. Kreais and Payton asked the Butlers to recommend an attorney, and Mike Morrissey ("Morrissey") was mentioned.

Morrissey, acting as the attorney of Kreais and Payton, drafted the lease, which designated the tenant as D & D Investments, Inc. ("D & D Invs.") and the landlord as the Butlers. The duration of the lease was from July of 2001 to June of 2003. The monthly rent was $3,000, totaling $72,000 for the duration of the lease.

D & D Invs. was incorporated on June 27, 2001, and the incorporation documents list Payton as the incorporator and the sole initial director. D & D stood for Danny [Kreais] and

Denise [Payton]. Payton signed the lease in June of 2001. At this time, the Butlers requested Kreais to personally sign the lease. Kreais promised to sign the lease, but did not do so in June of 2001.

Raymond Guertin ("Guertin") managed the Butlers' rental properties, including the Property. Guertin has worked for the Butlers for thirteen years and has a background in managing restaurants, purchasing restaurant/bar equipment, and drafting architectural designs. Prior to Kreais and Payton taking possession of the Property, Guertin made an inventory list ("pre-possession inventory list") of the furniture and attachments inside the Property.

Kreais and Payton took possession of the Property in June of 2001. Despite the clause in the lease requiring the Butlers' approval for any alterations or additions to the Property, Kreais, without such approval, removed two restrooms, removed a six-foot wall, installed a high-rise electric sign, removed the air conditioner, hired an electrician to rewire some components, and removed the horseshoe bar. Kreais threw away, without the Butlers' permission, part of the drop ceiling, the ceiling hot water heater, and a digital scale. Kreais removed a substantial amount of property from the premises, and placed some items in a unit at Butler Storage and other items, such as the ice cream freezer and refrigerated display case, in a unit at Corner 200 Storage. Kreais had the only key to the storage unit at Corner 200 Storage. A bar and restaurant named Mystix was eventually opened on the Property in March of 2002.

Kreais and Payton did not pay any rent in February or May of 2002. Due to this delinquency in rent, the Butlers received permission from the Sheriff's Department to change

the locks on the Property. The Butlers told Kreais and Payton that they would only be allowed to have possession of the Property if they came current on the rent, paid the late fees, and Kreais signed the lease in his personal capacity. Kreais and Payton acquiesced and regained possession of the Property.

Kreais and Payton created a document entitled "D & D Investments, Inc. Lease Payment Schedule June 2001 Thru June 2003 Alva and Sandra Butler." It indicates no rent was paid for February through June of 2003 and an amount less than the $3,000 monthly rent was paid for August, September, October, November, and December of 2001, and January and March of 2002.

After Kreais and Payton vacated the Property in April of 2003, Guertin used the pre-possession inventory list to inspect the leased premises. Guertin recorded that numerous inventory items were missing: 2 booths, 3 tables, 6 chairs, a ceiling hot water heater, 4 televisions, a display counter, 2 cash registers, an ice cream freezer, a refrigerated display case, a digital scale, a meat slicer, and a stainless steel table. Guertin also noted that the two bathrooms, drop ceiling, heat ducts, a six-foot wall, and eight ceiling fixtures had been removed and a wood door, the center isle counter, and some ceramic floor tiles were damaged. To ascertain the value of the missing and damaged items, Guertin called local suppliers.

Based on the unpaid rent and missing/damaged items, the Butlers filed a complaint against D & D Invs., Kreais, and Payton for breach of contract and conversion. On September 15, 2003, the trial court ordered a stay as to Payton, because of her Notice of Bankruptcy filed on September, 12, 2003. On December 23, 2003, the trial court granted the

Butlers' Verified Motion for Default Judgment against D & D Invs. and Kreais for $65,429.84.

On February 2, 2004, Kreais filed a Motion to Set Aside the Default Judgment, which was granted after a hearing on March 10, 2004. A bench trial was conducted on July 13, 2005. On January 17, 2006, the trial court entered its findings of fact and conclusions of law in favor of the Butlers against Kreais for $41,855.10, plus $647.62 in costs.

On February 15, 2006, Kreais filed a Motion to Correct Errors that was denied on March 29, 2006.[2] Kreais now appeals.

Discussion and Decision

Standard of Review

The trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A). Therefore, our standard of review is two-tiered: we first determine whether the evidence supports the trial court's findings, and second, we determine whether the findings support the judgment. Purcell v. Southern Hills Investments, LLC, 847 N.E.2d 991, 996 (Ind. Ct. App. 2006). Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them, and the trial court's judgment is clearly erroneous if it is unsupported by the findings and the conclusions that rely upon those findings. Id. In determining whether the findings or the judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom. Id.

[2] Neither party included in their appendices the submissions to the trial court regarding the Motion to Correct Errors. This limits our review to only the material presented to the trial court during the trial and to the trial

In conducting our review, we cannot reweigh the evidence or judge the credibility of any witness, and must affirm the trial court's decision if the record contains any supporting evidence or inferences. Id. However, while we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We evaluate questions of law *de novo* and owe no deference to a trial court's determination of such questions. Id.

I. Kreais' Personal Liability on Lease

First, Kreais asserts that the lease is not enforceable because the Butlers did not sign it. However, a contract does not always have to be in writing. Where there is a written contract and fewer than all the proposed parties execute the document, we still look to the intent of the parties as determined by the language of the contract to determine who may be liable under the agreement. Kruse Classic Auction Co., Inc. v. Aetna Cas. & Sur. Co., 511 N.E. 2d 326, 328 (Ind. Ct. App. 1987), reh'g denied, trans. denied. Thus, the lack of the Butlers' signatures does not invalidate the contract.

Next, Kreais contends that the trial court erred in finding him personally liable on the lease for the Property, because the lease defined the tenant as D & D Invs. and does not include Kreais. The parties to a particular contract normally may be identified as a matter of law from the terms of the contract, absent some sort of ambiguity. Broadhurst v. Moenning, 633 N.E.2d 326, 334 (Ind. Ct. App. 1994). A contract is ambiguous only if reasonable persons would differ as to the meaning of its terms. City of East Chicago v. Lake County Transfer, Inc., 854 N.E.2d 23, 31 (Ind. Ct. App. 2006), reh'g denied. Upon reviewing the provisions of a written contract, our goal is to determine the intent of the parties at the time of

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court's original findings of fact and conclusions of law.

execution as revealed by the language they chose in expressing their rights and responsibilities. Purcell, 847 N.E.2d at 1003. If the contract language is clear and unambiguous, we will give the language its plain and ordinary meaning. Id. Only when the meaning of the contract cannot be gleaned from the four corners of the instrument, does the intention of the parties become a question of fact and resort to extrinsic evidence proper. Id.

The lease for the Property reads as follows:

> THIS LEASE is made this _____ day of _____, 2001,[3] between Alva J. Butler and Sandra K. Butler ("Landlord") and D & D Investments Inc., an Indiana Corporation ("Tenant").

Appellant's Appendix at 12. At the end of the lease, it reads: "IN WITNESS WHEREOF, the parties have signed on this the date first above written." Id. Below that are the separate signatures of Payton and Kreais. Under each signature line is an additional line that reads: "(Print or Type Name) Tenant." Id. Kreais' name is printed on this line. Based on the four corners of the lease, it is unambiguous that Kreais is a party to the lease as a tenant based on the description of "tenant" below his signature. Kreais contends that he signed it as an agent of D & D Invs.; however, Kreais did not sign with such a designation nor did he present evidence that he held a position in the corporation that would create such an agency relationship. Contrary to his agency argument on appeal, Kreais testified that he signed the lease in his personal capacity. Therefore, the trial court properly determined that Kreais was a party to the lease as a tenant and signed in his personal capacity. Hence, in reading the lease, the term Tenant applies to both D & D Invs. and Kreais.[4]

[3] The lease is not dated.

[4] The determination of whether Payton signed in her individual capacity is not at issue, so we do not address

Kreais dedicates a significant portion of his brief to challenging particular findings of the trial court, labeling them contradictory where one finding refers to actions taken by D & D Invs. in its capacity as tenant and another finding refers to Kreais taking actions as tenant. Based on our conclusion that both D & D Invs. and Kreais are tenants, these findings are not contradictory as each acted in their capacity as tenant.

Kreais also argues that he was not a party to the lease in June of 2001, because he did not sign the lease until a year later. However, we disagree. A written contract is just a tangible version of an oral agreement, attempting to express the intent and responsibilities of the parties. To be valid, a contract need not be in writing, but in some circumstances may be partly in writing and partly oral, or solely oral. Sand Creek Country Club, Ltd. v. CSO Architects, Inc., 582 N.E.2d 872, 875 (Ind. Ct. App. 1991). Alva Butler testified that when they were discussing the lease, it was his understanding that Kreais would be personally liable on the lease. Kreais indicated that he was going to sign the lease contemporaneous to Payton signing, but put it off due to his business in Toledo. Kreais did not testify or bring forth any evidence to contradict Alva Butler's testimony. From this evidence, it is reasonable to infer that Kreais was a party to the lease from the time of the lease negotiations. Therefore, the trial court properly found that Kreais was a party to the contract from the time Kreais and Payton took possession of the property despite the written contract being completed later in time.

II. Calculation of Damages

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whether she too would be a tenant under the lease.

Kreais also challenges the trial court's calculation of damages as to the converted property. This court will sustain the trial court's award of damages so long as the amount is supported by evidence in the record. Additionally, no particular degree of mathematical certainty is required in awarding damages. Ballard v. Harman, 737 N.E.2d 411, 417 (Ind. Ct. App. 2000), reh'g denied. The computation of damages, if supported by any evidence in the record, is strictly a matter within the trial court's sound discretion. Id. In an action for conversion, the owner does not seek the return of the property, but the return of its value. Plymouth Fertilizer Co. v. Balmer, 488 N.E.2d 1129, 1140 (Ind. Ct. App. 1986), reh'g denied, trans. denied. The damages are measured by the market value of the property at the time of the conversion. Id.

As to the calculation of damages of the converted property, Kreais argues that the trial court's finding number 90 does not support the determination of damages.

> 90. The personal property was extensively used. The plaintiff admits that it had no market value.

Appellant's Brief at 51. Despite the trial court extensively citing[5] to the trial transcript to support its findings, this particular finding does not include a citation. After reviewing the entire transcript, we were not able to locate the source of testimony for this finding. Furthermore, Kreais does not direct us to the source. We therefore conclude that the evidence does not support finding number 90. However, without this finding, the findings regarding the value of the converted and damaged property are supported by the testimony of Guertin.

[5] Out of the ninety-two findings of fact, the trial court supported eighty-four with citation(s) to the trial

Guertin testified that he called local suppliers to determine the cost to replace the missing items. Based on the estimates for new versions of the missing property provided by Guertin, the trial court depreciated the figures by sixty-seven percent, essentially valuing the converted property at one third of the cost of replacement. Kreais argues that the trial court abused its discretion by selecting a depreciation figure without the assistance of expert testimony. As stated above, the calculation of damages does not require a particular degree of mathematical certainty. Lack of expert testimony as to the exact value of the property at the time of conversion does not invalidate a calculation of damages. A court can only make a determination based upon the evidence. Kreais had the opportunity at trial to present evidence of the value of the property or at least contradict the Butlers' valuation evidence, yet failed to do so. Kreais has not demonstrated that the trial court abused its discretion by valuing the converted property at one-third the cost of new items.

III. Attorney's Fees

Finally, Kreais asserts that the trial court erred in awarding attorney's fees to the Butlers, because Kreais is not a tenant under the lease and Indiana Code Section 34-24-3-1 permits such an award only if a person has suffered a pecuniary loss. Based on our conclusion that Kreais is a tenant under the lease and is personally liable, the trial court did properly award attorney's fees to the Butlers pursuant to the lease under Section 11.02(d)(5) ("If a default by Tenant has occurred under this Lease and is continuing, Landlord has the following remedies and obligations: . . . (d)(5) The right to collect from Tenant by any lawful means the attorney's fees, costs, and expenses, recoverable by Landlord." Appellant's

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transcript and exhibits.

Appendix at 11.)

Conclusion

Kreais is a party to the lease as a tenant based on his signature and his testimony that he signed the lease in his personal capacity. The trial court did not abuse its discretion in calculating damages as to the personal property that was converted by Kreais. Finally, pursuant to the lease, the Butlers are entitled to attorney's fees and costs.

Affirmed.

VAIDIK, J., and BARNES, J., concur.